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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-392

WILLIAM BROWN BURCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the Supreme Court of the United States

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WILLIAM BROWN BURCH,
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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on July 1, 1975.

CITATIONS TO OPINIONS BELOW

Order of the Court of Appeals unreported filed July 1, 1975. (A-1)

JURISDICTION

The Court of Appeals entered judgment on July 1, 1975.

The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTION PRESENTED

Whether the petitioner suffered a denial of due process under the Fifth Amendment through a harmful invasion of the jury's province by the District Court's instructions to the jury in which there was the explicit suggestion that the members of the jury should disregard totally the testimony of any witness whom they believed had lied and in which there was no guidance that they had the right to believe all or part or none of any witness's testimony.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

Constitution of the United States, Amendment V:

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Petitioner respectfully contends that Writ should be granted because the right to have the jury make an independent determination of the facts is an essential and fundamental element of due process under the Fifth Amendment.

STATEMENT OF THE CASE

Petitioner, William Brown Burch, was indicted in a one-count indictment for violation of Section 1201(a) of Title 18 USC in that he allegedly transported willfully in interstate commerce two persons who had been seized

unlawfully, confined, kidnapped, carried away and held for robbery, rape, and automobile theft.

The case was tried before a jury, and on June 12, 1974 petitioner was found guilty. On June 13, 1974 petitioner was given a life sentence by the Court pursuant to Section 4208(b) of Title 18 USC and was ordered to be transferred for evaluation to a medical facility for federal prisoners. On October 30, 1974 the Court reduced the sentence for imprisonment for a period of thirty-five (35) years.

Petitioner filed a proper Notice of Appeal and the case was heard by the United States Court of Appeals for the Sixth Circuit. Relief was denied by order of the Sixth Circuit on July 1, 1975. After a change of counsel on July 15, 1975, a motion to extend time for petition for rehearing was filed on July 22, 1975 and was granted. The petition was filed on July 22, 1975 and was denied on August 14, 1975. The petitioner is now properly before this Court.

STATEMENT OF THE FACTS

On January 25, 1973, four men seized a man and a woman from a parked automobile in Bell County, Kentucky. The man was robbed and both were bound and transported by their assailants to Tennessee. There the four men sexually assaulted the woman.

At the petitioner's trial the linchpin of the defense was the testimony of alibi witnesses that the petitioner could not have been present at the time of the mistreatment of the two victims.

In instructing the jury regarding the possibility that these alibi witnesses or any other witnesses might have lied, the District Court announced that it was his suggestion that the jury totally disregard the testimony of any witness whom they believed had lied.

ARGUMENT

Whether the Petitioner Suffered a Denial of Due Process Under the Fifth Amendment Through a Harmful Invasion of the Jury's Province by the District Court's Instructions to the Jury in Which There Was the Explicit Suggestion That the Members of the Jury Totally Disregarded the Testimony of Any Witness Whom They Believed Had Lied and in Which There Was No Guidance That They Had the Right to Believe All or Part or None of Any Witness's Testimony.

In his instructions to the jury at petitioner's trial the judge invaded harmfully the province of the jury by precluding the jury from its critical duty to assess the degree of credibility to be given each witness. Once the judge determined any witness to be qualified to speak at petitioner's trial, the belief of the jury in that witness's testimony rested solely with the jurors. *See United States* v. *Porjansky,* 465 F.2d 123, 136 (2d Cir.), *cert. denied,* 409 U.S. 1006 (1972) (no error in instruction to jury that veracity or credibility of testimony was solely their decision), IIIA WIGMORE ON EVIDENCE §1010 (Chadburn Rev. 1970). Nevertheless the judge at petitioner's trial instructed the jurors that, if they believed a witness had lied, it was his suggestion that they ". . . totally disregard the testimony of that witness." (A-2) No alternatives were given to the jury whose guidance on the law depended exclusively on the instructions of the judge. Because of this dependency, "[T]he influence of the trial judge on the jury is 'necessarily and properly of great weight' and his lightest word or intimation is received with deference and may prove controlling." *Quercia* v. *United States,* 289 U.S. 466, 470 (1933); *United States* v. *Ornstein,* 355 F.2d 222, 224 (6th Cir. 1966). The judge's

harmful influence on the jury at petitioner's trial was manifested not in a subtle light word or intimation but in an explicit suggestion that the jury had to accept or reject the entire testimony of each witness. With that misstatement of the law the judge initiated his crucially sensitive role, trespassed on the jury's function and responsibilities and thereby denied petitioner his right to have his innocence or guilt adjudged by the jury, as guaranteed by due process under the Fifth Amendment. *See United States* v. *Cisneros*, 491 F.2d 1068, 1074 (5th Cir. 1974); *Ornstein, supra* at 224.

Petitioner's jury had the right to believe all or part or none of the witness's testimony. *See United States* v. *Edwards*, 488 F.2d 1154, 1158 (5th Cir. 1974). Petitioner's jury, however, was never apprised of that right. Where the Court had instructed the jury to accept such portions of the testimony of the witnesses as they believed to be true and credible, the instructions were held to be reasonable and proper. *Costello* v. *United States*, 255 F.2d 389 (8th Cir.), *cert. denied*, 358 U.S. 830 (1958). Petitioner's judge instructed the jury to accept all or nothing of the testimony of a possibly mendacious witness. Where the judge had charged that the jury *could* disregard the entire testimony of the witness if it were false in part, the instructions were held not to be erroneous. *United States* v. *Passero*, 290 F.2d 238 (2d Cir.), *cert. denied*, 368 U.S. 819 (1961). The clear suggestion in the instructions at petitioner's trial was that the jury should, not could, disregard the entire testimony of a witness if it were false, even in part. Through that suggestion, the judge usurped the jury's exclusive responsibility to assess to what extent the testimony of any witness should be accepted. *Cf. United States* v. *Stephens*, 486 F.2d 915, 917 (9th Cir. 1973).

The effect of the charge at petitioner's trial should have been to instruct adequately, yet succinctly, the jury as to its function of determining independently the facts and applying the law as charged by the court to facts as found by the jury. *See United States* v. *Persico*, 349 F.2d 6, 8 (2d Cir. 1965). The result, however, at petitioner's trial was an intrusion of a misstatement of law into the determination of facts by the jury. Petitioner's conviction was decided by a jury that had been misled to believe that they should disregard totally the statements of a witness who might have testified falsely only in part. Thus the jury's guidance from the court was egregiously inadequate. *See* 1 E. DEVITT & C. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS §12.01 (2d ed. 1970) (juror gives the testimony of each witness such credibility, if any, as he or she may think it deserves); R. FORD & A. CLEMENTS, TRIAL JUDGES MANUAL OF CHARGES 165-66 (3d ed. 1959) (rule of law is that a juror *may* disregard the evidence of a person who has testified falsely to a material fact).

The effect of the judge's encroachment on the jury is incalculable. Petitioner's defense was based inextricably on the testimony of three witnesses as to his whereabouts at the time of the alleged offense. It was those witnesses' testimony that the misguided jury had to assess in the determination of petitioner's innocence or guilt. It is impossible to conclude that the judge's erroneous instructions did not affect petitioner's right to have the jury determine independently the facts. The Harmless Error Rule, therefore, is inapplicable. "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot

stand." *Kotteakos* v. *United States*, 328 U.S. 750, 765 (1946); *Ornstein, supra* at 225 (conviction overturned even where no objection was made to judge's remarks at the time). Because the judge's instructions were a harmful invasion of the jury's province and a denial of petitioner's right to a degree about which there must be grave doubt, petitioner's conviction should be overturned.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have this 10th day of September, 1975 mailed a copy of the foregoing to the Solicitor General of the United States, Department of Justice, Washington, D.C.

DALE QUILLEN

APPENDIX

NO. 75-1110

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee

v.

WILLIAM BROWN BURCH
Defendant-Appellant

ORDER

(Filed July 1, 1975)

BEFORE: CELEBREZZE, MILLER and LIVELY, Circuit Judges.

This is a direct appeal from a conviction of kidnaping. At his trial, the defendant elected to testify in support of his alibi defense. On cross-examination, he was asked about three previous convictions, and the jury was instructed to consider this evidence only as it related to the credibility of the defendant as a witness and that it should not be considered as substantive evidence on the charge for which he was being tried. Since the defendant's credibility was made an issue by his testimony, there was no error in permitting cross-examination on previous convictions of felonies or crimes involving moral turpitude when such testimony was accompanied by proper instructions limiting the purposes for which it could be received and considered by the jury.

We find no error prejudicial to the rights of the defendant in the district court proceedings. Accordingly, it is ORDERED that the judgment of conviction be and it hereby is affirmed.

Entered by Order of the Court

John P. Hehman, Clerk
By /s/ Grace Keller
Chief Deputy

EXCERPT FROM TRANSCRIPT

[Vol. II., 534-535] The Court: . . . If you believe that any witness who appeared in this Court lied, then I would suggest to you that you totally disregard the testimony of that witness.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-392

WILLIAM BROWN BURCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court erred in suggesting to the jury that they should "totally disregard the testimony of [any] witness" whom they believed to have lied.

Following a jury trial in the United States District Court for the Eastern District of Kentucky, petitioner was convicted of kidnapping, in violation of 18 U.S.C. 1201(a). He was sentenced initially to life imprisonment; subsequently the sentence was reduced to 35 years' imprisonment. The court of appeals affirmed (Pet. App. A).

On the evening of January 25, 1973, Davis Capps and his fiance were parked in the fiance's automobile on a road in Bell County, Kentucky, when four men approached the vehicle (Tr. 54–56, 92). One of the men, identified by Capps as petitioner, pushed a shotgun through the open window of the car. Capps grabbed the barrel and the weapon discharged, injuring no-one (Tr. 55–56, 58, 94).[1]

Capps then got out of the automobile and was assaulted by two of the men; at the same time his fiance was forcibly removed from the car (Tr. 56, 94). The men overpowered Capps, put tape over his eyes, robbed him, and put him in the trunk of the automobile. They also taped the woman's eyes and put her in the front seat of the car. The assailants then drove the couple to nearby Claiborne County, Tennessee, where the woman was raped by three of the attackers and sexually molested by the fourth (Tr. 60–62, 95, 97–104). The men then fled.

At trial Capps positively identified petitioner, whom he had known previously, as one of the assailants (Tr. 58–59).[2] The government also showed that petitioner's fingerprint appeared on a drinking glass found at the scene of the assault on Capps' fiance (Tr. 147–149, 177, 187). Petitioner's defense, which he attempted to establish through the testimony of several

[1] Capps had known petitioner for some time prior to the kidnapping and recognized him by "general features" and voice (Tr. 77–78, 85).

[2] Capps was never able to identify the other assailants; his fiance testified that she did not recognize any of them (Tr. 123).

witnesses, was that he was elsewhere at the time of the crime and had a bad cold that night which so affected his voice that Capps' identification of him, which was based on the voice as well as the general physical characteristics of the assailant, must have been mistaken (Tr. 226–238, 277–278, 301–302, 309–310, 313–314, 319, 321, 330, 332, 336, 351–352, 359, 369–366, 381–389, 407–410).

Petitioner claims error in the district court's charge to the jury that (Tr. 534–535) "[I]f you believe that any witness who appeared in this Court lied, then I would suggest to you that you totally disregard the testimony of that witness." Petitioner did not object to the charge at trial (Tr. 537), however, and therefore must be deemed to have waived it. Rule 30, Fed. R. Crim. P. If he had objected, the court could have given a supplementary or clarifying instruction. Nor did petitioner challenge the instruction on appeal. The issue is therefore not properly presented here and there are no special circumstances that should lead this Court to depart from its usual practice of not considering issues not raised in the courts below. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n. 2; *Lawn* v. *United States*, 355 U.S. 339, 362 n. 16.

In any event, when read in context, the portion of the charge challenged by petitioner did not improperly invade the province of the jury. The court charged as follows (Tr. 530–535):

> One last instruction I want to give you, and I give it to you because you are confronted

with evidence, which if believable on both sides, leaves you somewhere in the middle, and I want to talk to you for a moment about the credibility of witnesses. In considering the trial of any case, you should consider the testimony of each individual witness against the background created by all other evidence in the case, because that's the landscape and the test that you have available to you. * * *

* * * * *

Consider whether or not any discrepancies you find in this evidence to be material to main points to the essential elements, or whether they apply to some minor inconsequential fact.

* * * * *

Now, in saying all of this, I am not saying that witnesses lied, although some do, but what I am saying to you is simply to describe what I believe to be a very normal occurrence in fallible, frail human beings. It is very easy for all of us to have an innocent misrecollection of what occurred at some time in the past, or to have a partial recollection, and the fact that a person does not recall or does recall minutia, or very small details, in and of itself is not a critical factor if you believe that he is the type of person that normally would recall those. In any event, the best test is to find that evidence which you are naturally persuaded by, that for you has a high credibility factor, that you believe it and you put trust in it, and when you find that standard, compare all of the other evidence in the case against it.

> Ladies and Gentlemen, it may be that eventually you will have to get to the point where you decide that a witness was not making some innocent error in testimony, but was making an intentional falsehood in their testimony. If you believe that any witness who appeared in this Court lied, then I would suggest to you that you totally disregard the testimony of that witness.
>
> After you have made your own individual judgment as to all of the evidence and the evidence of each individual witness, you will give to it such credibility and belief as you think is proper and from that evidence which you find to be believable and credible you will make your decision as to the two essential elements in the crime of kidnapping.

* * * * *

We submit that these instructions, taken as a whole, did not deny petitioner a fair trial. The court told the jury that they should consider whether discrepancies in a witness' testimony were material or simply inconsequential, and repeatedly stressed that they should decide for themselves what credibility to give to the testimony of each individual witness. The instruction did not point to any witness or group of witnesses, but left it wholly to the jury to decide whether knowing falsification had occurred and, if so, by whom. Moreover, at the outset of the instructions the court instructed the jury that they were the sole judges of the facts (Tr. 508). Finally, the testimony of most of the defense witnesses related solely to petitioner's whereabouts on the night of the kidnapping, and in these circumstances a knowing falsifica-

tion in one material respect would necessarily make the witness' entire testimony suspect.

Thus, in the context of this case, the district court's suggestion that the jury disregard the testimony of a witness it believed to have intentionally lied amounted to no more than a recommendation that the jury should hesitate to credit such unreliable evidence. The instruction as a whole adequately impressed upon the jurors their exclusive authority to judge the credibility of the witnesses, and was not an impermissible attempt by the trial judge to influence the outcome of the trial. See *United States* v. *Howard,* 433 F.2d 505, 512 (C.A.D.C.).[3]

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

---

[3] *United States* v. *Cisneros*, 491 F.2d 1068 (C.A. 5), and *United States* v. *Ornstein*, 355 F.2d 222 (C.A. 6), relied upon by petitioner, are inapposite. In *Cisneros* the district judge in commenting on the evidence "became for a short moment a witness in [the] trial, testifying about something he had seen"; indeed, "he came very close to behaving for an instant as an actual witness for the prosecution" (491 F.2d at 1075). In *Ornstein* the court in the presence of the jury opined "that the Government had proved what were several essential elements of the crime" charged (355 F.2d at 225). In the case at bar the district court neither acted as a witness nor led the jury to believe that the government had successfully discharged its burden of proof in any way.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-392

WILLIAM BROWN BURCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION TO REHEAR ON BEHALF OF WILLIAM BROWN BURCH, PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-392

WILLIAM BROWN BURCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION TO REHEAR

Comes the petitioner, William Brown Burch, and respectfully petitions the Court to rehear his Petition for Writ of Certiorari heretofore denied on December 15, 1975, pursuant to Rule 58[2] of the Rules of this Court, and for grounds would show that the Memorandum of the United States in opposition in this case stated that the Petitioner had not challenged on appeal the instruction whose validity is the subject of the Petition and that the Court should accordingly follow its usual practice of not considering issues not raised in the lower Courts.

Petitioner would show that this was an incorrect statement on the part of the Solicitor General and attaches hereto on appendix page A1 a letter dated December 15, 1975 conceding such error.

Wherefore, Petitioner prays that he be granted a rehearing in this cause.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

CERTIFICATE

Dale Quillen, attorney for petitioner, respectfully certifies to the Court that this Petition for Rehearing is presented in good faith and not for delay, and the Petition is restricted to the grounds above specified.

DALE QUILLEN

CERTIFICATE OF SERVICE

I, Dale Quillen, hereby certify that I have this 6th day of January, 1976, caused three copies of the foregoing Petition to Rehear to be served upon the Honorable Robert H. Bork, Solicitor General, Department of Justice, Washington, D.C. 20530.

DALE QUILLEN

APPENDIX

OFFICE OF THE SOLICITOR GENERAL
Washington, D.C. 20530

December 15, 1975

Honorable Michael Rodak, Jr.
Clerk
Supreme Court of the United States
Washington, D.C. 20543

Re: Burch v. United States (No. 75-392)

Dear Mr. Rodak:

In the Memorandum for the United States in Opposition in this case, in which certiorari was denied today, the government stated (p. 3) that the petitioner had not challenged on appeal the instruction whose validity is the subject of the petition and that the Court should accordingly follow its usual practice of not considering issues not raised in the lower courts. It has come to our attention, however, that petitioner did raise the point in a petition for rehearing in the court of appeals. This fact, however, did not affect the validity of either the other point made in the same paragraph on page 3—that the issue is not properly presented because petitioner did not object to the charge at trial—or our argument on the merits (pp. 3-6) that the charge was proper.

Would you please distribute copies of this letter to the Court.

Sincerely,

Robert H. Bork
Solicitor General

cc: Dale M. Quillen, Esquire
308 Cavalier Building
95 White Bridge Road
Nashville, Tennessee 37205